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State of Washington
DEPARTMENT OF FISH AND WILDLIFE

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ENVIRONMENTAL AFFAIRS

September 13, 2004

TO: Regulatory Services Section Staff
Regional Habitat Program Managers
Assistant Regional Habitat Program Managers
Area Habitat Biologists

FROM: Gayle Kreitman 

**SUBJECT: GUIDANCE - COMPENSATORY MITIGATION REQUIREMENTS PER
WSDOT MOA**

The purpose of this memo is to provide clarifying guidance to an earlier memorandum that I sent April 1, 2003 (attached) regarding this same subject. Questions continue to be raised from both agencies as to when WDFW will require compensatory mitigation on WSDOT maintenance projects. As you are all aware, mitigation is required for adverse impact to fish life due to project activities. Both WAC 220-110-020(54) and WDFW policy (POL-M5002 Requiring or Recommending Mitigation) require mitigation be sequenced, starting with avoidance, then proceeding to minimization, rectifying, reducing, compensating and monitoring, in that order. POL-M5002 is attached.

The issue is arising due to a particular section (Section 8.2.a.iii) of the Memorandum of Agreement (MOA) between WDFW and WSDOT, which states:

*“WSDOT Maintenance Superintendents within each region, using a definition and criteria developed jointly by WSDOT and WDFW, develops a detailed and accurate list of known chronic environmental deficiencies. WSDOT intends to develop a new funding category that will provide an inventory, scoping, prioritization, and programming process for environmental deficiency removal projects where implementation of maintenance and operations BMP’s may not be able to avoid and minimize significant adverse environmental impacts. Chronic environmental deficiencies that are prioritized by this process, that pose the greatest risk to fish life, would be targeted for retrofit construction. Projects would be limited to the amount of funding received by the Washington State Legislature. *Until projects are funded, WDFW agrees to issue HPAs for maintenance activities to keep the highway operational and WSDOT agrees to provide mitigation through avoidance and minimization of impacts for these projects.* If the I-4 retrofit program ceases to function then compensatory mitigation may be required as appropriate on a project-by-project basis.” (Emphasis added)*

The Chronic Environmental Deficiency (CED) program is making some progress and we are now actively engaged in discussions and negotiations with WSDOT to ensure the CED program addresses our concerns and needs for fish protection. Once definitions and criteria for the program are developed to the mutual agreement of WDFW and WSDOT and working well, the CED program will be added to the MOA as an appendix, and the MOA (Section 8.2.a.iii) will be revised. In the interim, better guidance than that previously given is needed.

On August 11, 2004, WDFW (Bob Bicknell, Craig Olds, and I) met with WSDOT (Gregor Myhr and Sandy Stephens) to revise the interim guidance previously developed for Section 8.2.a.iii of the MOA. The following guidance supersedes that given in the April 1, 2003 memorandum and will also be distributed by Gregor and Sandy to WSDOT field staff. Until completion of agreed upon definitions and criteria for the CED program and inclusion in a revised MOA, WDFW and WSDOT agree to the following when implementing Section 8.2.a.iii:

1. Compensatory mitigation shall be required for temporary or permanent new development associated with a maintenance activity.
2. Compensatory mitigation may be required for replacement of an existing functional structure that is damaged or destroyed accidentally. These will be addressed on a case-by-case basis.
3. No compensatory mitigation shall be required for routine maintenance of a functional structure for the maintenance activity that is not new or re-development.
4. Maintenance of a structure may or may not be "in-kind." Alternatives to in-kind maintenance, such as installing a larger culvert or bioengineering bank protection rather than replacing riprap with riprap, may be pursued. Compensatory mitigation may not necessarily be required for maintenance that involves replacement of a structure that results in habitat improvement such as installing a larger culvert. These will be addressed on a case-by-case basis.
5. WDFW staff, i.e., Area Habitat Biologists, Liaisons, will be invited to attend maintenance activity training provided by WSDOT.
6. WDFW will continue participating in the Chronic Environmental Deficiency Program.
7. Disputes regarding interpretation of numbers 1, 2, 3 or 4 above shall be resolved in the following sequence:
 - a. Resolve the issue at the local level (Area Habitat Biologist (AHB) to Regional Maintenance Environmental Coordinator (RMEC));

- b. If unresolved at the local level, either the AHB or RMEC may contact the WSDOT liaison in WDFW (currently Craig Olds) to facilitate resolution;
- c. If still unresolved, the Liaison then elevates the issue by contacting and coordinating resolution with the WDFW Regional Habitat Program Manager (or assistant) and the WSDOT Regional Environmental Manager.

It is expected that both WDFW and WSDOT will attempt to resolve issues at the lowest level and only elevate issues when other avenues of resolution have been exhausted. If any program changes are exposed through this process as part of the resolution, the proposed changes should be forwarded to the Water Quality Policy Manager at WSDOT and the Regulatory Services Section Manager at WDFW.

DEFINITIONS

Functional structure means any structure (e.g., culverts, bridges, terminals) that moves traffic along established state highways.

New development means temporary access roads, work platforms, new riprap or armoring material.

Re-development means increasing the functional capacity of the structure.

Routine maintenance of a functional structure means removing debris from a structure (e.g., culvert, bridge, terminal), or removing temporary bed load accumulation (may occur more than once a year).

If you have any questions please contact Craig Olds at (360) 902-2540, or me at (360) 902-2564. If you have questions regarding the CED program, please contact Bob Bicknell at (360) 274-9814. Thanks.

GK:bb

cc: Peter Birch, WDFW
Patty Lynch, WSDOT
Gregor Myhr, WSDOT
Sandy Stephens, WSDOT

Attachments (2)